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No. 84-1699

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1984

PUBLIC SERVICE COMPANY OF INDIANA, INC.,
*Petitioner,*

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE WITH BRIEF AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

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## TABLE OF AUTHORITIES

Page

**Statutes:**

Staggers Rail Act of 1980, §214, Pub. L. 96-448, 94 Stat. 1913 (1980) ..... 2

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## MOTION OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) hereby respectfully moves for leave to file the accompanying brief as amicus curiae. The written consents of the Solicitor General, Public Service Company of Indiana, Inc., and Seaboard System Railroad have been obtained and filed with the Clerk of the Court. The other respondent below, Association of American Railroads, has not consented.

The NARUC is a quasi-governmental nonprofit unincorporated organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Colum-

## INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Public Service Commission of Indiana (Indiana Commission) is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating rail carriers within their respective borders. As such, these officials have the obligation to assure the establishment of rail carrier services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislature, established to regulate carriers operating within their respective jurisdiction. The NARUC, in its capacity as the representative of the State regulatory commissions, participated before the Court of Appeals in this case as an Intervenor-Petitioner.

The Court of Appeals decision for which Petitioner seeks review affirmed decisions of the Interstate Commerce Commission (ICC or the Commission) preempting an earlier decision of the Public Service Commission of Indiana (Indiana Commission) which established maximum reasonable rate levels for the intrastate rail transportation of coal for electric generating purposes. (The ICC's decisions are attached as Appendices E and F to the Petition

for Certiorari). Acting pursuant to the recently-enacted section 214 of the Staggers Rail Act of 1980 [codified at 49 U.S.C. §11501(b and c) (Supp. 1983)], the ICC reversed and preempted the Indiana Commission's rate order and authorized the carrier, the Louisville & Nashville Railroad (L & N), to charge captive shippers a rate determined to be unreasonably high by the State agency.

In affirming the Commission, the Court of Appeals held that the ICC had properly preempted the Indiana Commission because the State agency had failed to correctly apply Federal ratemaking intrastate standards in determining the reasonableness of intrastate rail rate levels. In so holding, the panel reasoned that although the ICC had established no standards of its own for determining rate reasonableness, the statutory provisions of the Staggers Act provided a yardstick to measure the performance of the Indiana Commission (App. at 17a). The panel further reasoned that these provisions established a "balancing approach in ratemaking" whereby the needs of rail carriers to earn adequate revenues under honest, economical and efficient management must be balanced against the interest captive shippers have in not paying unreasonably high rates for rail transportation. (App. at 13a-17a). Under this balancing approach, the panel found that each regulatory agency (including the States and the ICC) must employ "a flexible, non-mechanical approach to ratemaking" in which each factor (revenue needs, efficient management, and protection of captive shippers) "must be given genuine consideration." (App. at 17a). Of greatest concern to the NARUC and its member commissions is the panel's conclusion that section 214 of the Staggers Act grants the ICC broad authority to preempt State decisionmaking by simply restriking the regulatory balance even when the State has considered and weighed

## TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE ..... 2

SUMMARY OF ARGUMENT ..... 4

ARGUMENT ..... 5

THE COURT OF APPEALS' DECISION VIOLATES THE CONGRESSIONAL COMPROMISE PRESERVING MEANINGFUL STATE RAIL REGULATION ..... 5

CONCLUSION ..... 9

## TABLE OF AUTHORITIES

**Cases:** Page

*Community Communications Co. v. Boulder*, 455 U.S. 40 (1982) ..... 5

*Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ..... 5

*Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963) ..... 5

*Florida v. United States*, 282 U.S. 194 (1931) ..... 8

*Illinois C.R. Co. v. State Public Utilities Commission*, 245 U.S. 443 (1917) ..... 8

*North Carolina v. United States*, 325 U.S. 507 (1945) ..... 8

*Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1943) ..... 5, 7

Page

*Utah Power & Light Co. v. ICC*,
747 F.2d 721 (D.C. Cir. 1984) ..... 8

*Wheeling-Pittsburgh Steel Corporation v. ICC*,
723 F.2d 346 (3d Cir. 1983) ..... 7, 8

**Statutes:**

Staggers Rail Act of 1980, §214,
Pub. L. 96-448, 94 Stat. 1913 (1980) ..... *passim*

49 U.S.C. §10501(c) (1983) ..... 7

49 U.S.C. §11501(b) (1983) ..... 3, 7

49 U.S.C. §11501(c) (1983) ..... 3, 7

**Legislative Materials:**

H.R. Rept. No. 1430, 96th Cong. 2d Sess. (1980) ..... 7

H.R. 7235, 96th Cong. 2d Sess. (1980) ..... 7

126 Cong. Rec. 18,298 (1980) ..... 7

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## BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING PETITION FOR CERTIORARI

The National Association of Regulatory Utility Commissioners hereby submits its brief as *amicus curiae* in support of the petition for certiorari filed by the Public Service Company of Indiana, Inc. seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Public Service Company of Indiana, Inc. et al. v. Interstate Commerce Commission and United States,* 749 F.2d 753 (D.C. Cir. 1984) (Appendix A to the Petition for Certiorari).

## INTEREST OF AMICUS CURIAE

The National Association of Regulatory Utility Commissioners (NARUC) is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands, engaged in the regulation of utilities and carriers. The Public Service Commission of Indiana (Indiana Commission) is a member of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating rail carriers within their respective borders. As such, these officials have the obligation to assure the establishment of rail carrier services and facilities as may be required by the public convenience and necessity, and the furnishing of dependable service at rates that are just and reasonable. The State regulatory commissions are the creatures of their respective legislature, established to regulate carriers operating within their respective jurisdiction. The NARUC, in its capacity as the representative of the State regulatory commissions, participated before the Court of Appeals in this case as an Intervenor-Petitioner.

The Court of Appeals decision for which Petitioner seeks review affirmed decisions of the Interstate Commerce Commission (ICC or the Commission) preempting an earlier decision of the Public Service Commission of Indiana (Indiana Commission) which established maximum reasonable rate levels for the intrastate rail transportation of coal for electric generating purposes. (The ICC's decisions are attached as Appendices E and F to the Petition

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In affirming the Commission, the Court of Appeals held that the ICC had properly preempted the Indiana Commission because the State agency had failed to correctly apply Federal ratemaking intrastate standards in determining the reasonableness of intrastate rail rate levels. In so holding, the panel reasoned that although the ICC had established no standards of its own for determining rate reasonableness, the statutory provisions of the Staggers Act provided a yardstick to measure the performance of the Indiana Commission (App. at 17a). The panel further reasoned that these provisions established a "balancing approach in ratemaking" whereby the needs of rail carriers to earn adequate revenues under honest, economical and efficient management must be balanced against the interest captive shippers have in not paying unreasonably high rates for rail transportation. (App. at 13a-17a). Under this balancing approach, the panel found that each regulatory agency (including the States and the ICC) must employ "a flexible, non-mechanical approach to ratemaking" in which each factor (revenue needs, efficient management, and protection of captive shippers) "must be given genuine consideration." (App. at 17a). Of greatest concern to the NARUC and its member commissions is the panel's conclusion that section 214 of the Staggers Act grants the ICC broad authority to preempt State decisionmaking by simply restriking the regulatory balance even when the State has considered and weighed

each of the required statutory standards. This finding of virtually unfettered ICC discretion in this area of regulation threatens the ability of State regulators to decide and issue binding maximum rail rate determinations.

## SUMMARY OF ARGUMENT

From the perspective of the NARUC, the Petition for Certiorari presents an issue of exceptional national importance to the State regulatory commissions which comprise its membership: whether the compromise contained in section 214 of the Staggers Rail Act of 1980 to allow continued State regulation of intrastate rail rates and services will be construed to afford State commissions the meaningful regulatory role that Congress intended when it rejected total Federal preemption of State rail jurisdiction. By granting the ICC the unfettered power to overturn decisions of State regulatory authorities, the decision of the Court of Appeals upholding the ICC's preemptive decisions does grave violence to Congress' intention that the States play a meaningful regulatory role. The broad authority afforded the ICC to simply restrike the balance between intrastate shipper and rail interests means that any State decision, however well-reasoned and faithful to the standards and procedures of Federal law, may be reversed if the ICC so chooses, and that reversal will be accorded "great deference" by the courts upon subsequent review.

The NARUC submits that the broad and essentially standardless authority granted the ICC by the panel violates the congressional compromise (embodied in section 214 of the Staggers Act) to preserve meaningful State regulation. If left intact, the panel's opinion will likely render State rail regulation a futile effort, a result clearly not con-

templated by the Congress when it rejected total preemption of State rail jurisdiction. Therefore, this Court should grant the petition in order to establish the limits on the ICC's preemptive authority that the statute requires.

## ARGUMENT

### THE COURT OF APPEALS' DECISION VIOLATES THE CONGRESSIONAL COMPROMISE PRESERVING MEANINGFUL STATE RAIL REGULATION

By its decision, the Court of Appeals affirmed an order of the ICC which served to preempt the earlier rate order of the Indiana Commission. Yet nowhere in its decision does the Court of Appeals address the standards for analyzing the preemptive effect of Federal legislation (and agency actions taken thereunder) established by this Court. It is, of course, now well-settled that in analyzing the scope and effect of Federal preemption, Federal courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1943). Indeed, this Court had often stated that it "is generally reluctant to infer pre-emption." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132 (1978); *Community Communications Co. v. Boulder*, 455 U.S. 40, 61 (1982) (Rehnquist, J. dissenting). Only when Congress has "unmistakably . . . ordained" that Federal enactments must prevail will State law be preempted. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963). In short, courts should presume that State actions and enactments are legitimate and not preemptible.

By contrast, the Court of Appeals granted the decision

of the Indiana Commission no presumption of correctness, nor did it require the ICC to defer to the ratemaking expertise of the State agency. Despite its conclusion (App. at 22a) that rate reasonableness determinations require a flexible balancing approach which presumes that the agency of jurisdiction has discretion to assign differing weights to different ratemaking factors, the Court of Appeals concluded that the ICC had "plenary" authority to review the State commission, and therefore need give no deference to the States' fact-finding or standard-balancing efforts. (App. at 18a). This holding will permit the ICC to reverse and preempt every State ratemaking decision with which it disagrees for any or no reason at all.

This conclusion is inescapable, where, as here, the fundamental issue to be decided by the ICC is whether the State agency has properly balanced Federal ratemaking standards. That a proper "balance" will always fall within a zone of reasonableness is self-evident. Reasonable persons can always disagree whether slightly more or less weight should be given any one factor, and moreover, the act of arriving at a balanced result may always be viewed as somewhat arbitrary within this zone. Without deference to the State's decision, or a presumption of non-preemptibility, the ICC will always be able to disagree with the fluid, flexible balance between rail and shipper interests adopted by a State by asserting that the State should have given slightly more weight to revenue needs or slightly less weight to management inefficiency. If this kind of ICC decisionmaking continues to receive judicial approval of the sort accorded by the Court of Appeals, it will be virtually impossible for a State to issue a rate decision which will withstand the scrutiny of an ICC that simply disagrees with the State's result.

The Court of Appeals decision, then, is essentially a formula for the total preemption of State ratemaking authority through the mechanism of the ICC review process. This result, however, overlooks a wealth of information documenting Congress' intent not to totally preempt State rail regulation. First of all, the original version of the Staggers Act introduced in the House of Representatives which would have totally preempted the States *did not pass.*[1] Secondly, Congress left virtually intact the provision of the ICC's basic jurisdictional statue which limits the Commission's authority over intrastate rail transportation. 49 U.S. §10501(c) (1983).[2] Thirdly, Representative Broyhill's Amendment to the bill which became the Staggers Act *did pass.* Prompted by the "great concern" expressed by the State regulatory commissions concerning total preemption,[3] the Broyhill Amendment was adopted by the Congress in 49 U.S.C. §11501(b and c) as a compromise which avoided the total preemption of State regulatory authority originally proposed.[4]

This legislative compromise should be respected.[5] State ratemaking decisions must be presumed to be non-preemptible by the ICC so long as the State applied appropriate "standards and procedures." 49 U.S.C. §11501(c). This means that in the absence of Federal standards

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[1]H.R. 7235, 96th Cong. 2d Sess. (1980).

[2]The language of section 10501(c) preserving State police powers directly parallels this Court's rule that preemption should not be assumed, quoted in *Rice v. Santa Fe Elevator Corp., supra,* at 5. Section 10501(c) effectively denies the ICC original jurisdiction to decide intrastate rail caes.

[3]126 Cong. Rec. 18,298 (1980).

[4]H.R. Rept. No. 1430, 96th Cong., 2d Sess. 105-106 (1980).

[5]The U.S. Court of Appeals for the Third Cirucit has ably described this compromise. *Wheeling-Pittsburgh Steel Corporation v. ICC,* 723 F.2d 346, 352-53 (3d Cir. 1983), quoted in Pet. for Cert. at 6-7.

assigning specific weights to be accorded each of the relevant ratemaking factors, the ICC should presume that the decision of a State agency which considers and weighs each such Federal standard (revenue needs, efficiency and protection of captive shippers) correctly balances the interests of carriers, shippers, and the public in just and reasonable rail rate levels.

In *North Carolina v. United States,* 325 U.S. 507 (1945), this Court held the ICC to just this sort of rigorous standard in rail preemption proceedings. Specifically, the Court held that ICC decisions to preempt State rail determinations must meet "a high standard of certainty," 325 U.S. at 511, citing *Illinois C.R. Co. v. State Public Utilities Commission,* 245 U.S. 443, 510 (1917), and the justification for the "exercise of the Federal power must clearly appear." *Id.,* citing *Florida v. United States,* 282 U.S. 194, 211, 212 (1931). This Court has not retreated from its holding in *North Carolina* and the Third Circuit has found that *North Carolina* applies to preemptive ICC decisions issued pursuant to the Staggers Act. *Wheeling-Pittsburgh Steel Corp. v. ICC, supra,* at 352-53.[6] We submit that *North Carolina* simply restates the basic preemption doctrine long established by this Court that preemption must not be presumed by Federal courts and agencies reviewing State actions. *See supra* at 5. The Court of Appeals, however, afforded the Indiana Commission's ratemaking decision no presumption of correctness and nonpreemptibility. In so doing, the Court granted the ICC preemptive powers not intended by Congress.

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[6] *But see Utah Power & Light Co. v. ICC,* 747 F.2d 721, 736 (D.C. Cir. 1984) and cases there cited.

## CONCLUSION

For the foregoing reasons, we respectfully urge this Court to issue a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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